Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING
Appellant,

vs.

THE STATE BAR OF CALIFORNIA
Appellee.

On Appeal from the Supreme Court
of California

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant who stipulated in proceedings below to accept such discipline as might be finally imposed against David Ashburn Grey, his law partner, for the broadcasting by the law partnership of an advertisement seeking professional employment, may now, after a public reproval was imposed on David Ashburn Grey and certiorari was denied by this Court (Grey v. The State Bar of California, U.S. S.Ct. No. 86-791), seek this Court's review of such stipulated discipline.

2. If appellant is not by his stipulation precluded from seeking review in this Court, may a lawyer be subjected to professional discipline (a public reproval) for broadcasting an advertisement soliciting professional employment which is inherently misleading in that a client gave a testimonial about and

endorsement of the lawyer by telling of a substantial recovery the attorney obtained for the client (who was involved in a traffic accident on a freeway) but omitting relevant facts which would have disclosed that a great portion of that recovery was based on an unusual cause of action and special facts (a bad faith claim against an insurance company) not available to most claimants?

3. May discipline be imposed pursuant to a Rule of Professional Conduct that forbids lawyer advertising that tends to confuse and mislead the public and requires the inclusion in such advertising of statements that are intended to reduce or eliminate the likelihood that recipients of the advertising will be misled?

4. May discipline be imposed for an advertisement that on its fact is inherently confusing and misleading to the

public but which with a few additional words of explanation and caveat could have been corrected so that it did not confuse or mislead?

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Appellant,

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MOTION TO DISMISS OR AFFIRM

Appellee, The State Bar of California, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Supreme Court in Mark H. Oring v. The State Bar of California (Cal. S.Ct. Docket No. S002271)* On October 28, 1987, the

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* The State Bar Court is not a court of record. It acts as a quasi-judicial arm of

(Footnote continued on next page.)

California Supreme Court denied appellant's Petition for Writ of Review of an order of the State Bar Court imposing a public reproval on appellant.

I

THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

The Rules of Professional Conduct of The State Bar of California are adopted by the Board of Governors of The State Bar of

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(Footnote continued from preceding page.)

The Supreme Court of California, and is established by the State Bar, pursuant to statute, to hear lawyer discipline matters and make recommendations as to suspension or disbarment to the California Supreme Court. Cal. Bus. & Prof. Code, §§ 6077, 6078, 6081 and 6086.5. The State Bar Court may impose public or private reprovals on members of the State Bar without recommendation to the Supreme Court (Bus. & Prof. Code, §§ 6077, 6078), but the members may seek review of that action in the California Supreme Court which may or may not grant review. Once review is sought, whether or not it is granted, the final disciplinary decision becomes that of the Supreme Court of California. See Konigsberg v. The State Bar of California, 353 U.S. 252, 254, 77 S.Ct. 722, 724 (1957).

California. When approved by the Supreme Court of California they are binding upon all members of The State Bar of California and for their violation the State Bar may administer a public or private reproval to the member or recommend to the Supreme Court that he or she be suspended from the practice of law for a period not exceeding three years. Cal. Bus. & Prof. Code, §§ 6077, 6078.

At issue in this proceeding is rule 2-101 of the Rules of Professional Conduct. Rule 2-101 was approved by the Supreme Court of California effective April 1, 1979 subsequent to and partially in response to this Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2671 (1977).*

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* The study leading to the revision of the California Lawyer Advertising Rules began and continued for some years before the Bates decision.

Rule 2-101, as relevant here, reads as follows:

'RULE 2-101. PROFESSIONAL EMPLOYMENT.

"This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

"Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

"(A) A 'communication' is a message concerning the availability for professional employment of a member or a member's firm. A 'communication' made by or on behalf of a member shall not:

"(1) Contain any untrue statements; or

"(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

"(3) Omit to state any fact necessary to make the statements made, in the light of

the circumstances under which they are made, not misleading to the public; or

"(4) Fail to indicate clearly, expressly or by context, that it is a 'communication'; or

"(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

"(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

* * *

"(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what 'communications' will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. 'Presumption affecting the burden of proof' means that presumption defined in Evidence

Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar."

Pursuant to rule 2-101(D), the Board of Governors of the State Bar has adopted the following standards effective May 25, 1979:

"(1) A 'communication' which contains guarantees, warranties or predictions regarding the result of legal action is presumed to violate rule 2-101, Rules of Professional Conduct.

"(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct.

"(3) A 'communication' which is delivered in person or by telephone to a potential client who is in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel, is presumed to violate rule 2-101, Rules of Professional Conduct.

"(4) A 'communication' which is transmitted at the scene of an accident or at or en route

to a hospital, emergency care center or other health care facility is presumed to violate rule 2-101, Rules of Professional Conduct."

II

STATEMENT OF THE FACTS

The essential facts were stipulated.

1. In or about 1982, appellant, along with his law partner, David Ashburn Grey,* engaged in a radio advertising program concerning his availabiity for professional employment.

2. On such radio "spot" consisted of a former client of appellant, Sharon S., giving the following message:

"I was rear ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harrassed me, just all in all gave me a bad

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* This Court denied certiorari to David Ashburn Grey on January 12, 1987. The identical advertisement was involved, the identical constitutional issues were asserted. (Grey v. The State Bar of California, No. 86-791.)

time. I contracted [sic] an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey & Oring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I'd definitely go back to Grey & Oring. I certainly do believe that."

Said message was followed by an announcer adding:

"Grey & Oring. That's G-R-E-Y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

3. The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their

office was present at the time the radio spot was recorded.

4. At the time he engaged in said radio advertising program, appellant was aware of rule 2-101 and, in particular, of presumption (2), adopted pursuant to rule 2-101(D) of the Rules of Professional Conduct, which states as follows: "(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct."

A Hearing Panel* of the State Bar Court, after reviewing the stipulated

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* In California the State Bar Court consists of numerous hearing panels which take evidence, make findings of fact and, if appropriate, recommendations of discipline. There is one Review Department which reviews Hearing Panel decisions and either adopts or (after giving the parties an opportunity to be heard) modifies the Hearing Panel decision. The ultimate

(Footnote continued on next page.)

facts and hearing argument concluded there was no culpability shown because rule 2-101(D) and Standard (2) were unconstitutional. The Review Department found the rule and standard constitutional and imposed a public reproval. Neither the Hearing Panel nor the Review Department made a finding as to whether the advertisement was or was not inherently misleading or in fact actually misled anyone.

During the course of the proceedings before the State Bar Court, appellant Oring and the State Bar Examiner entered into a Stipulation as to Facts and Disposition whereby certain factual statements were agreed upon and it was

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(Footnote continued from preceding page.)

decision or recommendation of the State Bar Court is made by the Review Department. Cal. Bus. & Prof. Code, § 6086; Rules of Procedure of The State Bar of California printed in Cal. Civ. & Crim. Court Rules, vol. 23, part 2, pp. 290-323 (West 1986).

agreed that appellant would be admonished. (Appellant's Appendix D (app. 10).) However, it was also agreed that the Oring stipulation would not be filed, nor of any force and effect, until such time as a "final disciplinary Order was made and entered as against [David Ashburn Grey]. Any Order so made as to DAVID A. GREY shall not be deemed 'final' unless and until all appeals, petitions for hearing, petitionrs for certiorari, etc. have been exhausted at all State and Federal levels should GREY seek such relief." (Appellant's Appendix E (app. 12).) The parties further stipulated that it was their intent that appellant "shall not be subject to any greater discipline at any time as [sic] the degree of discipline ultimately imposed on GREY." (Appellant's Appendix E (app. 13).) The parties agreed the stipulation as to discipline was subject to review by the Review Department

of the State Bar Court and the recommended discipline would not be binding on the California Supreme Court. (Appendix D (app. 10).) At the time of the filing of the Oring stipulation, counsel for appellant stated on the record:

> "Mr. Cohen: . . . In other words our intent is that whatever happens to Mr. Grey would happen to Mr. Oring." (Transcript of Dec. 5, 1984 proceedings, p. 3.)

Thereafter further proceedings were had involving Mr. Grey only. Appellant took no part in the Grey proceedings either before the State Bar Court or in Grey's efforts to persuade the California Supreme Court to grant review and the U.S. Supreme Court to grant certiorari. Grey did ultimately seek certiorari before this Court which was denied on January 12, 1987. (No. 86-791.) Thus the public reproval imposed on David Ashburn Grey for the same advertisement that is in issue in this proceeding was upheld and final.

The Grey disposition being final in April 1987, the Review Department of the State Bar Court proceeded pursuant to appellant's stipulation to impose the same discipline on him as had been upheld as to Grey. Appellant sought California Supreme Court review (which was denied on October 28, 1987) and appeal to this Court followed. This appeal raises the identical constitutional contentions that were previously before this Court when it denied certiorari in the Grey matter.

III

ARGUMENT

A. APPELLANT, BY HIS STIPULATION TO THE SAME DISCIPLINE THAT MIGHT ULTIMATELY BE IMPOSED ON DAVID ASHBURY GREY, HAS WAIVED ANY RIGHT TO URGE CONSTITUTIONAL CHALLENGES BEFORE THIS COURT

Before the State Bar Court, appellant stipulated to the same degree of discipline, if any, that might ultimately be imposed on David A. Grey. Grey

litigated the matter to this Court and certiorari was denied. (No. 86-791.) Holding appellant to his stipulation, the State Bar Court Review Department imposed a public reproval on appellant. This is the same discipline imposed on David Ashburn Grey, and it arises from the identical stipulated facts. The same constitutional contentions were made in Grey and certiorari was denied. Appellant now seeks to rehash these identical issues and, in addition, to avoid his stipulation. We submit that, for this reason alone, the appeal should be dismissed and the Supreme Court of California's order affirmed.

B. THE DECISION BELOW WAS DECIDED IN A WAY CONSISTENT WITH THE APPLICABLE DECISIONS OF THIS COURT AND PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN SETTLED BY THIS COURT

Rule 2-101(A) is on its fact constitutional. The restraints it places

on lawyer advertising are, we submit, as limited as those imposed by any rule now existing in the United States. In essence rule 2-101(A) prohibits lawyer advertising that contains untrue statements (rule 2-101(A)(1)); that uses a manner or format which is false or deceptive or which tends to confuse, deceive or mislead the public (rule 2-101(A)(2)); that omits to state any fact necessary to make the statements it contains not misleading to the public (rule 2-101(A)(3)); that fails to state it is a "communication" (i.e., an advertising message) (rule 2-101(A)(4)); that makes false statements regarding the member's status as a certified specialist (rule 2-101(A)(5)); or that is transmitted in a manner that is intrusive or coercive, etc. (rule 2-101(A)(6)).

There is no contention that appellant's radio advertisement violated subdivisions (4), (5) or (6). The parties

stipulated and the Review Department found that the statements made by Sharon S. in the advertisement were true and reflected her own actual experience.

However, the State Bar submits that in this case the advertisement in question on its face violated subdivision (2) and subdivision (3) of rule 2-101(A) and this is so, whether the rebuttable presumption of rule 2-101(D) is applied or not.

In the advertisement broadcast by appellant, Sharon S. stated:

> ". . . I got a nice award of money and all of a sudden, I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to triual and suddenly the insurance company offered me double the amount f the original trial. . . ."

Because this was the result of Sharon S.'s case, it does not simply follow that the advertised result would be available to the average consumer of legal services. Sharon S.'s case was unique and that

uniqueness was the set of underlying facts which gave rise to a bad faith cause of action against the defendant's insurance company. This factual pattern is seldom, if ever, present in most accident cases and the cause of action that Sharon S. had (and the resulting "double" recovery) are just not available to most prospective litigants. This was not explained--or even hinted at--in the broadcast advertisement. We submit it is clear from the face of the advertisement that it inherently tended to confuse and mislead the public that heard that broadcast (in violation of rule 2-101(A)(2)). Also, with the addition of a few words of appropriate disclaimer and factual explanation, the natural misconceptions inherent from the advertisement could have been avoided. Thus rule 2-101(A)(3) would not have been violated.

Under the law of this land, misleading advertisements may be restrained. See Virginia State Board of Pharmacy v. Virginia Consumers Council, 425 U.S. 748, 96 S.Ct. 1817 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2671 (1977); In re Primus, 436 U.S. 417, 98 S.Ct. 1893 (1978); In re RMJ, 455 U.S. 191, 102 S.Ct. 929 (1981); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265 (1985).

As to the validity of restricting misleading commercial speech, in fields other than the legal profession, see Central Hudson Gas v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343 (1980); Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887 (1979).

This Court has emphasized that attorneys who question the regulation of advertising are required to show that

their particular advertisements are constitutionally protected speech.

In answer to the contention that an overbroad regulation of lawyer advertising might serve to chill protected speech, the Court stated:

> "But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. at 771 n.24, 96 S.Ct. at 1830, there are 'common sense differences' between commercial speech and other varieties. See also id. at 775-781, 96 S.Ct. at 1832-1835 (Concurring Opinion). Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See id. at 771-772 n.24, 96 S.Ct. at 1830-1831. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. Ibid. Since overbreadth has been

> described by this court as 'strong medicine,' which 'has been employed . . . sparingly and only has a last resort,' (citation omitted) we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective." (Emp. added.) (433 U.S. at 380-381, 97 S.Ct. at 2707-2708.)

Thus, in the context of commercial speech, the overbreadth doctrine is unavailable to attorneys challenging the validity of regulations on such speech. Appellant must challenge the regulation as it applies to his conduct.

This is not a case where the meaning of the advertisement was clear and concise; the advertisement did confuse and mislead. Nor is it a case where the person responsible for the content of the advertisement (i.e., appellant, not his ad agency or Sharon S.) undertook by the use of simple explanations or caveats to make clear the actual meaning of Sharon S.'s statement and how unique her particular recovery

was. The constitutional arguments against a complete prohibition of lawyer testimonial advertising in these situations (whatver merit those arguments might have) are just not available here.

Further, neither rule 2-101(A) nor Standard (2) prohibit testimonial advertising by lawyers. A lawyer is free to advertise with testimonials if such advertisements are honest statements by the endorser and do not confuse or mislead the public. Further, a lawyer can place in a testimonial ad words of explanaton or caveat to reduce or eliminate the chances of confusing or misleading the public. In any disciplinary procedure, the lawyer is only required to show that the ad is not inherently misleading and that he has taken adequate steps to insure that.

The four Standards adopted by the California Board of Governors pursuant to rule 2-101(D) are specific and narrowly

drawn. The reason behind Standard (2) was explained in the Committee Report to the Board:

> "Testimonials are inherently deceptive and misleading because past performance of an attorney is no indication of future performance, and because no lawyer can guarantee the results of any legal action.
>
> "Advertising of acquittals or large verdicts may lead the public to believe that the likelihood of obtaining a similar result is high if the services of this particular attorney are obtained, and ignores the importance of facts, applicable law, and an attorney's selective choice of clients in determining the outcome of a case."

Lawyer advertisement is now a fact of life and has been since this Court's 1977 decision in Bates. California has recognized this and proceeded apace with the formulation and adoption of rules that would permit the widest range of lawyer advertising possible consistent with the legitimate state interest of public protection by preventing false

advertising, misleading advertising, confusing advertising and deceptive advertising. Rule 2-101 is that rule and Standard (2) adopted pursuant to that rule is recogition that, in lawyer advertising, testimonials and endorsements are likely to be inherently misleading. It puts on the advertiser (in this case, appellant) the burden of either insuring that his ads do not confuse or mislead or explaining why they do not. That is not an excessive burden for an advertiser to assume.

The State Bar Court Review Department concluded that Standard (2) as applied to appellant was constitutional. This conclusion was upheld by the Supreme Court of California. The ad in question was inherently confusing and misleading; the defects could have easily been remedied by providing more information in the ad. Appellant failed to do this and he provided no explanation.

IV

CONCLUSION

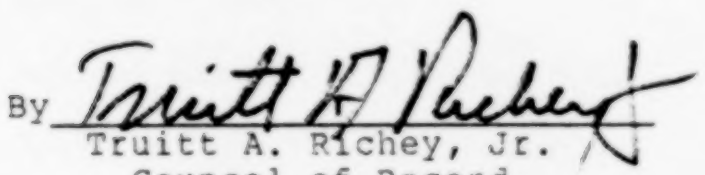
The decision below was decided in accord with constitutional principles established by this Court.

For the foregoing reasons, appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this case by the Supreme Court of California.

Dated: February 18, 1988

Respectfully submitted,

Diane C. Yu
Truitt A. Richey, Jr.
Gerald R. Markle
Erica Tabachnick

By 
Truitt A. Richey, Jr.
Counsel of Record

Attorneys for
The State Bar of California

DECLARATION OF SERVICE BY MAIL

I, Chiyeko Kimura, declare as follows:
I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 Franklin Street, San Francisco, California 94102. On February 18, 1988, I served the within

MOTION TO DISMISS OR AFFIRM

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Scott Spolin
Theodore A. Cohen
Wells Fargo Bank Building
433 North Camden Drive, Suite 900
Beverly Hills, CA 90210

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 18th day of February, 1988 at San Francisco, Califorinia.